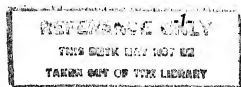


1. This paper seeks comments on the implications for Northern Ireland of the recommendations in chapters 10 and 11 of the report of the Royal Commission on Criminal Justice (reproduced in Annex A to this paper), and of the proposals in the discussion paper *Criminal Appeals and the Establishment of a Criminal Cases Review Authority*, published by the Home Office in March 1994 (reproduced in Annex B).

The Royal Commission

2. The Royal Commission on Criminal Justice was appointed in June 1991 to examine the effectiveness of the criminal justice system in England and Wales. Its report was published on 6 July last year. In view of the substantial similarities between the system in England and Wales and that here, the Secretary of State announced that he would want to consider the report's implications in the context of Northern Ireland. He welcomed public comment on the applicability of the report's recommendations here. The Secretary of State remains ready to receive views on the Northern Ireland implications of any part of the report.
3. Chapter 10 of the report makes proposals for changes to the powers of the Court of Appeal. Chapter 11 makes proposals for dealing with alleged miscarriages of justice, including the establishment of a Criminal Cases Review Authority. The Home Office discussion paper develops a number of aspects of the Royal Commission proposals, and seeks public comment. These issues are of no less importance in Northern Ireland than in England and Wales, and the Government accordingly wishes to receive comments on their relevance to local circumstances. This paper, which is intended to be read with the Royal Commission's



proposals and the discussion paper, points out a number of factors that need to be taken into account here, and provides a framework for comment.

The Court of Appeal

4. The chief recommendations in chapter 10 of the Royal Commission's report concerned the statutory grounds for appeal (recommendations 316-317) in section 2 of the Criminal Appeal Act 1968, the consequences of a finding by the Court that there had been an error at trial (318), the reconsideration of the jury's verdict where there has been no fresh evidence (319), the approach the Court should adopt to the consideration of fresh evidence (320-3), including appeals based on alleged error by trial lawyers (321), and the power of the court to commission further investigations by the proposed Criminal Cases Review Authority (325).
5. Paragraphs 6 to 26 of the discussion paper (cited in this paper as 'DP 6-26') records the Government's inclination to support the Commission's general prescription for the reform of the Court of Appeal, which it believes to a large extent reflects the Court's own developing response to unsafe convictions. The Government is not, however, inclined to follow the recommendation (324) that in cases not involving fresh evidence, where a retrial would be desirable but not practicable, the court should automatically allow the appeal. It also wishes to consider further in the light of comment a proposal that the Court should be able to refer cases to the new Authority. The paper also seeks views on the question whether the Court should be enabled to appoint counsel to assist it when an appeal is not contested by the Crown.
6. In Northern Ireland, the statutory formulation of the Court of Appeal's powers in section 2 of the Criminal Appeal (Northern Ireland) Act 1980 is similar to that of the English court in the 1968 Act, and the practice of the Court has been similar. The Government believes that the considerations set out in the Commission's report, and in the discussion paper, apply equally in Northern Ireland; and it sees advantage in the framework within which the two courts operate remaining the same. Accordingly it believes, subject to the comments it receives, that in principle the propositions set out in the discussion paper should apply in Northern Ireland as in England and Wales.

Arrangements for dealing with alleged miscarriages of justice

The Royal Commission proposals

7. The Royal Commission concluded that the power by which the Home Secretary may refer cases of alleged miscarriage of justice in England and Wales to the Court of Appeal was incompatible with the constitutional separation of powers as between the courts and the executive, and recommended that these responsibilities should be transferred away from the Home Office – a view that had been supported in evidence to it by several serving and former Home Secretaries. It recommended the creation of a Criminal Cases Review Authority, independent of both the Government and the Courts, to consider representations made to it, generally after a conviction had been upheld by the Court of Appeal, that miscarriages of justice might have occurred, ensuring that further investigations took place where it appeared necessary. The Authority would be empowered to refer cases direct to the Court of Appeal. It would consist of several members, chosen from both lawyers and lay people. It would be supported by legal and administrative staff and have access to specialist advisers. It would make an annual report to a Minister, who would lay it before Parliament and answer for the Authority's resources and composition; but without these arrangements compromising its operational independence.
8. The Government has accepted in principle that such an Authority should be established in England and Wales. The discussion paper considers the Royal Commission recommendations in detail and elaborates them.

Current arrangements in Northern Ireland

9. The system for dealing with alleged miscarriages in Northern Ireland is similar to that in England and Wales. Section 14(1) of the Criminal Appeal (Northern Ireland) Act 1980 provides that:

Where a person has been convicted on indictment or, being charged on indictment with an offence, has been found not guilty on the ground of insanity, the Secretary of State may, if he thinks fit, –

- (a) refer the whole case to the Court of Appeal and the case shall then be treated for all purposes as an appeal to the Court by that person; or
- (b) if he desires the assistance of the Court on any point arising in the case, refer that point to the Court for its

opinion thereon, and the Court shall consider the point so referred, and furnish the Secretary of State with its opinion thereon accordingly.

In considering applications to exercise this power, successive Secretaries of State have guided themselves by the same principles that have been applied by Home Secretaries, namely that they would generally refer a conviction to the Court of Appeal only if there had emerged some new evidence or consideration of substance, not previously considered by the courts, which appeared to touch on the safety of the conviction. There is no power to deal with summary convictions in this way: if it is established that a miscarriage of justice has occurred in such a case, the Secretary of State may recommend exercise of the Royal Prerogative of Mercy; as he may do very exceptionally in an indictment case, for example a very old one where a reference to the Court of Appeal has become impracticable through the passage of time.

The desirability of change in Northern Ireland

10. Allegations of miscarriages of justice have become somewhat more frequent in Northern Ireland in recent years. However, there has been one major reference to the Court of Appeal.
11. The argument that it is undesirable, and inconsistent with the constitutional separation of powers as between the courts and the executive, for the power of reference to lie with Ministers is also persuasive in Northern Ireland, and the Government believes that here, too, the power of reference should be transferred to an independent body.

Possible structures for considering alleged miscarriages in Northern Ireland

12. The practical arrangements for a body to exercise such a power in Northern Ireland raise difficult questions. Four possible models are considered below, with some of their advantages and disadvantages, but this list is not intended to be exhaustive:
 - (i) *the Criminal Cases Review Authority Model.* A separate authority could be set up for Northern Ireland along similar lines to that in England and Wales. Such a scheme would meet the Commission's criteria for independence, while ensuring that Northern Ireland cases would be considered by people well versed in the distinctive aspects of local crime and jurisprudence. But there would also be disadvantages. Most obviously, the workload in Northern Ireland would almost certainly be substantially smaller, and there

would thus be practical difficulties in setting up a multi-member authority, with a multi-disciplinary staff, as in England and Wales. It might, however, by means of formal or informal links, arrange to supplement its own resources from the Authority in England and Wales;

- (ii) there might be an individual *Reviewer of Criminal Cases* in Northern Ireland. (The Opsahl Report recommended a scheme along these lines). The advantage over a multi-member body would be that the Reviewer might be full-time, or more nearly so, and would thus more readily develop experience of dealing with a range of cases. He might, as in the previous model, draw on the resources of the Authority in England and Wales. But a single Reviewer would lack a multi-member authority's ability to bring a range of different backgrounds to bear; and these would be heavy responsibilities to entrust to a single individual, without full-time advisory support;
- (iii) *ad-hoc appointment of Commissioners to consider individual alleged miscarriages* would bring in an independent element to the reference process, and could be readily adapted to meet the workload. This option would however maintain a degree of Ministerial involvement: the decision to appoint would have to rest with Ministers, sometimes involving difficult judgments, with the initial filtering of cases presumably still lying with government officials;
- (iv) *extending the remit of the Criminal Cases Review Authority to Northern Ireland* would overcome the staffing problems outlined above. However, such an Authority would lack the full range of local knowledge and expertise that a multi-member Authority based in Northern Ireland would enjoy, which might create difficulties where the legal systems of England and Wales and Northern Ireland differ. The appointment of a member of the Authority with the Northern Ireland expertise, and arrangements for it to call on staff resources from Northern Ireland, might however alleviate these problems.

13. The question of the structure for dealing with alleged miscarriages is evidently of first importance in Northern Ireland. The Government would welcome views on the options set out above, or on any alternatives.

Detailed arrangements for the operation of a new system

14. Other issues arise from the Royal Commission recommendations and the Home Office discussion paper and need to be resolved in Northern Ireland. The principal ones are set out in the following paragraphs. The response may in some cases depend on the decisions made about the kind of referring body appropriate in Northern Ireland circumstances; but in general the Government's provisional conclusion is that the factors set out in the discussion paper are applicable in Northern Ireland as they are in England and Wales, and accordingly, subject to comment, it proposes that provision in Northern Ireland should be along the same lines as is envisaged there.
15. *Arrangements for referring cases in respect of sentence* (DP 30-32). In Northern Ireland, as in England and Wales, the Secretary of State is empowered to refer doubtful sentences to the Court of Appeal, under section 14 of the 1980 Act, though the power has not been exercised in recent years. The Government believes, as in England and Wales, that whichever agency is charged in Northern Ireland with making references as to convictions should also be empowered to refer cases as to sentence, in accordance with the criteria referred to in paragraph 19 below.
16. *Arrangements for dealing with summary cases in which a miscarriage of justice is alleged* (DP 33-38). Again, in Northern Ireland, summary cases fall outside the scope of present reference powers, the only remedy where a conviction appears unjust being the exercise of the Royal Prerogative of Mercy. The Government believes this would be an unsatisfactory state of affairs once new arrangements exist for dealing with such circumstances in cases tried on indictment. It provisionally proposes that the referring agency in Northern Ireland should also be competent to refer summary cases to the appropriate court; and that in "erroneous information" cases (DP 35), a Resident Magistrate or the Crown Court should be empowered to quash a conviction; it is also inclined to the view that the responsibility in Northern Ireland for deciding which course a case should follow (DP 37) should rest with the Resident Magistrate.
17. *Exclusion of sub judice cases* (DP 39-40). The Government is inclined to the view, as in England and Wales, that the Northern Ireland referring agency should be precluded from referring a case where an avenue of appeal lay open, but not from investigating once the 28-day limit is exhausted.

18. *Grounds for referring cases as to conviction* (DP 41-46). The Government proposes, as in England and Wales, that a referring agency here should be empowered to refer cases within a broad statutory formulation, certain factors being listed in statute to be taken into account in reaching a decision.
19. *Grounds for referring cases as to sentence* (DP 47-48). The Government does not believe it would be appropriate in Northern Ireland, any more than in England and Wales, for the referring agency to be involved in questions of sentencing generally; it proposes that the agency should be empowered to refer cases only in the limited circumstances envisaged in the discussion paper.
20. *Procedure of the Court of Appeal following a reference* (DP 49-50). The Government believes that, as at present and as proposed in the discussion paper, the Northern Ireland Court should treat appeals following references in the same way as ordinary appeals, the referring agency's role thereupon ceasing.
21. *Procedure for consideration by the Authority* (DP 51-70):
 - (i) *General* (DP 51-53): whatever the model of referring agency chosen in Northern Ireland, the Government believes that its procedures will need to be flexible, and investigative rather than adversarial;
 - (ii) *Investigations* (DP 54-65): the referring agency will need to have powers to request and, where appropriate, oversee inquiries carried out by police officers. The Government will consider further the possibility of officers being seconded to such an agency, but, since workload is likely to vary substantially in a jurisdiction of Northern Ireland's size, the scope for such an arrangement may be limited;
 - (iii) *Other powers to facilitate the referring agency's inquiries* (DP 66-67): the Government will, as in England and Wales, consider in the light of comment what powers a Northern Ireland agency might need to obtain access to documents;
 - (iv) *Investigations where there is also a complaint against the police being investigated under the supervision of the Independent Commission for Police Complaints* (DP 68-70): the possibility of two demands arising in parallel for investigations in a particular case also arises in Northern Ireland and further consideration will be needed of arrangements for handling such cases.

22. *Informing applicants of the progress and outcome of cases* (DP 71-73). The Government believes that whatever its form, a Northern Ireland referring agency will wish to give the fullest and promptest information possible to the applicant about his case: this is particularly important to the maintenance of confidence. However cases will vary, and difficult questions may arise in connection with the passing on of information and documents: the agency will need, as is proposed for the Criminal Cases Review Authority, to be able to make its own decisions about when and to what extent it passes on information, and how far it involves the applicant in its investigations.
23. *Appeals and judicial review* (DP 74-76). The Government accepts that in Northern Ireland as in England and Wales there should be no appeal from the decisions of the referring agency; and welcomes views on the possibility of its decisions not being subject to judicial review.
24. *The Royal Prerogative of Mercy* (DP 77-80). The Royal Prerogative has been exercised in Northern Ireland in similar circumstances and on a similar basis to those in England and Wales; with the creation of the new machinery proposed, its proper scope will similarly change. The Government would welcome views on the proposition that this might be reflected in legislation.
25. *Membership and staff of a referring agency* (DP 81-84). Decisions on these matters will to some extent depend on the form of referring agency chosen here. So far as structures permit, however, the Government agrees that a broad range of background and experience should be brought to bear, and that both lawyers and non-lawyers should be involved; and that a broad range of expertise should be available to the agency, directly through its staff and otherwise.
26. *Responsibility for decision-making within the referring agency* (DP 85-88). This too will depend on the form of agency chosen. The smaller size of a Northern Ireland authority, if that were the model chosen, would make collective decision-making less cumbersome, and the Government is inclined to the view, subject to comments, that such an arrangement would be more satisfactory in Northern Ireland circumstances.
27. *Appointment and accountability* (DP 89). Arrangements will again depend on the structure chosen. Whatever their form, however, they must reflect the principle that a Northern Ireland referring

agency should make its decisions, and develop its approach to cases independently of ministerial involvement.

28. *Legal advice and assistance* (DP 90). 'Green Form' legal aid would also be available in principle in Northern Ireland to any applicant to the Northern Ireland referring agency, and when a case was referred. Any such agency in Northern Ireland would – see paragraph 21(i) above – be investigative rather than adversarial in its method of working, and accordingly questions of legal representation would not arise.
29. *Compensation in cases of wrongful conviction* (DP 91-94). Section 133 of the Criminal Justice Act 1988 provides a statutory scheme for the payment of compensation for miscarriages of justice, and applies in Northern Ireland as it does in England and Wales. As there, it is unlikely to be appropriate to confer the function of deciding on payment of compensation on a referring agency, of whatever form.

Responses

30. The Government would welcome as wide a range of comment as possible on this paper. Comments should be sent to:

Northern Ireland Office
Criminal Justice Policy Division
Dundonald House
BELFAST BT4 3SU

to arrive as soon as possible and no later than 15 July 1994.
Further copies of this paper can be obtained by telephoning Belfast (0232) 527517.

Annex A

Recommendations of the Royal Commission

CHAPTER 10: COURT OF APPEAL

302. The Judicial Statistics or the Criminal Statistics should provide a clearer breakdown of the numbers applying to the single judge for leave to appeal, success rates, renewal rates, the number of cases heard by the full court and eventual outcome.
303. The Law Society and Bar should take all necessary steps to ensure that practitioners perform their duty to see the client at the end of the case and give preliminary advice both orally and in writing.
304. The Prison Service should ensure that prisoners are not taken away from the court precincts before a cell visit by counsel and the instructing solicitor takes place.
305. During the cell visit, clients should be advised in writing, as well as orally, whether counsel provisionally thinks that there are grounds of appeal or needs time to consider the matter. Written advice should follow the format of Appendix One of the guide issued by the Criminal Appeal Office and a copy should be signed by the defendant.
306. The discrepancy between the Law Society's and the Bar's guidance on the time within which a written opinion should be available from counsel on lodging an appeal should be resolved. The solicitor should correspond with and if necessary visit the client in prison in order to complete the paperwork in time. It should be made clear that this work by solicitors qualifies for legal aid.
307. The Court of Appeal should issue a practice direction giving clear guidance on the application of the time loss rules.
308. Prison Governors should be given adequate resources to enable them to provide interpreters for prisoners who do not speak English so that they can communicate with their lawyers.
309. A policy document should be produced by the Prison Service on the provision of assistance with appeals, including a commitment to interview every new inmate to ensure that his or her right of appeal is fully understood and that an inmate who wants information on how to appeal is given it, as well as advice on how to get in touch with his or her lawyer in confidence.
310. The Prison Service should set up a reliable system for locating prisoners for the purpose of enabling solicitors and members of families to get in touch with them.
311. There should be improved arrangements for visits to prisoners from lawyers.
312. Special assistance should be available for illiterate prisoners.
313. Convicted defendants should have the right to legal aid to enable their grounds of appeal to be drafted at the stage of the initial application by their solicitor if the latter does not agree with counsel as to whether there are sufficient grounds of appeal.

314. The entitlement to advice on appeal for those on legal aid should cover advice on whether to renew the application if it is rejected by the single judge. Where counsel advises in writing in favour of renewal, legal aid should be granted for counsel to settle the grounds and then argue the application before the full court.
315. The length of the sentence and the relative lack of merits in any grounds of appeal should be factors in determining the numbers of days lost under the time loss provisions. The maximum should be 90 days.
316. Section 2(1) of the Criminal Appeal Act 1968 should be redrafted in view of the present overlap between the grounds of appeal and the confusion over the scope of the proviso.
317. In the view of the majority of us the present grounds of appeal should be replaced by a single broad ground which would give the court flexibility to consider all categories of appeal. We suggest the correct approach is for the court to decide whether the conviction "is or may be unsafe".
318. The majority of us take the view that if the error would have made no difference to the safety of the conviction, the appeal should be dismissed. If the court believes that the error has rendered the conviction unsafe the appeal should be allowed. If the court believes that the conviction may be unsafe as a result of the error it should order a retrial.
319. As part of the redrafting of section 2 of the Criminal Appeal Act 1968 it should be made clear that the Court of Appeal should quash a conviction, notwithstanding that the jury reached their verdict having heard all the relevant evidence and without any error of law or material irregularity having occurred, if, after reviewing the case, the court concludes that the verdict is or may be unsafe.
320. In considering whether to receive fresh evidence the Court of Appeal should take a broad approach to the questions of whether the fresh evidence was available at the time of the trial and, if it was, whether there is a reasonable explanation for the failure to adduce it then or for any subsequent departure by a witness from the evidence given at the original trial.
321. Where an appeal is based on alleged error by trial lawyers, the test to be applied should not be confined to whether there was "flagrantly incompetent advocacy". What matters is whether the particular decision, whether reasonable or unreasonable, caused a miscarriage of justice.
322. The test for receiving fresh evidence should be whether it is "capable of belief".
323. Where the Court of Appeal would have ordered a retrial to test the fresh evidence but a retrial is impracticable or undesirable, it should decide the matter for itself.
324. In cases other than fresh evidence cases, where a retrial is desirable but not practicable a majority of us consider that the court should automatically allow the appeal.
325. The Court of Appeal should be free to refer matters that require further investigation to the new body which we recommend (see recommendation 331) should be responsible for the investigation of alleged miscarriages of justice.
326. Where a person is convicted of conspiracy to pervert

the course of justice on the grounds that he or she interfered with members of the jury in a case which led to the acquittal of the defendant or defendants, the trial at which jury returned that verdict of acquittal should be regarded as a nullity. If practicable, the acquitted defendant or defendants should be prosecuted again for the same offence.

327. Wherever the Court of Appeal hears in full court an application for leave to appeal, it should, if it calls upon the Crown to respond to the applicant's case, grant leave to appeal at that point, thus preserving the possibility of a further appeal to the House of Lords.

328. The requirement that before an appeal can be made to the House of Lords the Court of Appeal must certify that the case involves a matter of law of general public importance should be dropped.

329. Senior circuit judges nominated by the Lord Chief Justice should be able to sit as members of the full court.

330. Serious consideration should be given to the possibility of the Court of Appeal sitting in regional centres.

CHAPTER 11: CORRECTION OF MISCARRIAGES OF JUSTICE

331. The Home Secretary's power to refer cases to the Court of Appeal under section 17 of the Criminal Appeal Act 1968 should be removed and a new body the "Authority" should be set up.

332. The role of the Authority should be to consider allegations put to it that a miscarriage of justice may have occurred, to ensure that any further investigation called for is launched, to supervise that investigation if conducted by the police, and, where there are reasons for supposing that a miscarriage of justice might have occurred, to refer the case to the Court of Appeal.

333. The legislation which establishes the Authority should give it operational independence but require it to submit an annual report to the Minister concerned, who in turn should be required to lay the report before Parliament. The Minister should be answerable to Parliament about resources and whether the Authority was properly constituted for the task it was required to perform.

334. The Chairman of the Authority should be appointed by the Queen on the advice of the Prime Minister. Other members might be appointed by the Lord Chancellor.

335. The Home Secretary should be responsible for reporting to Parliament on the way in which the new arrangements are implemented.

336. The Authority should be independent of the court structure.

337. Where the Authority believes that a case should be considered by the Court of Appeal, it should refer the case to that court, together with a statement of its reasons for so referring it and, at the same time, provide the Court with such supporting material as it believes to be appropriate and desirable, and which it believes may be admissible, though without any recommendation or conclusion as to whether or not a miscarriage of justice has occurred. The Court of Appeal would then treat any case so referred in the same way as an appeal from the Crown Court.

338. The Court of Appeal should ensure that the defence and prosecution receive copies of the statement and supporting material and any additional material that the Authority thinks fit.

339. The possible use of the Royal Prerogative of Mercy should be kept open for the exceptional case.

340. There should be neither a right of appeal nor a right to judicial review in relation to decisions reached by the Authority.

341. The Authority should consist of several members, with both lawyers and lay persons being represented.

342. The Chairman of the Authority should be chosen for his or her personal qualities rather than for any particular qualifications or background that he or she may have, but should not be a serving member of the judiciary.

343. The Authority should be supported by a staff of lawyers and administrators and have access to specialist advisers.

344. The Authority should devise its own rules and procedures for selecting cases for investigation, subject to its being able to conclude in each case so selected that there is, or may be on investigation, something to justify referring the case to the Court of Appeal.

345. The Authority should be able to discuss cases direct with applicants and be adequately resourced to conduct interviews with prisoners where it believes that this might help.

346. Where cases are referred from the Court of Appeal, the appellant should only be interviewed, by agreement and in the presence of his or her legal adviser.

347. The Authority should have powers to direct investigations, including deciding which lines of inquiry need to be pursued, and to order that an investigation be carried out by a police force different from the one that investigated the original offence.

348. The possibility of the Authority, or police officers undertaking investigations under its direction, being given additional powers should be kept under review.

349. The Authority should be responsible for ensuring that both the applicant and the prosecution are kept properly informed during the course of the investigation, whether or not issues of disclosure arise.

350. The Authority should in general be responsible for disclosing any evidence found in the course of its investigations that is relevant to the representations about the conviction or throws doubt on that or other convictions.

351. Where a question of public interest immunity arises, the matter should be determined by a single Lord Justice of the Court of Appeal, *ex parte* in appropriate cases.

352. Where an applicant to the Authority requires legal representation, legal aid should be made available, on the basis of recommendations by the Authority.



Annex B

Criminal appeals and the establishment of a Criminal Cases Review Authority

A Discussion Paper

Contents	Paras
Introduction	1 - 2
General Principles of Reform	3 - 5
Reform of the Court of Appeal	6 - 18
(i) <i>Grounds for appeal</i>	7 - 10
(ii) <i>Error at Trial</i>	11
(iii) <i>Reconsideration of the jury's verdict where there is no fresh evidence</i>	12
(iv) <i>Fresh evidence</i>	13 - 18
Uncontested Appeals	19 - 21
Power of the Court of Appeal to Commission Investigations	22 - 26
Criminal Cases Review Authority	27 - 28
Scope of the Authority's powers	29 - 40
(i) <i>Representations as to sentence</i>	30 - 32
(ii) <i>Summary cases</i>	33 - 38
(iii) <i>Exclusion of sub judice cases</i>	39 - 40
Grounds for Referring Cases to the Courts	41 - 48
(i) <i>Conviction</i>	41 - 46
(ii) <i>Sentence</i>	47 - 48
Procedure of the Court of Appeal in an Appeal Following a Reference	49 - 50
Procedure for Consideration by the Authority	51 - 70
(i) <i>General</i>	51 - 53
(ii) <i>Investigations</i>	54 - 65
(iii) <i>Other powers to facilitate the Authority's enquiries</i>	66 - 67
(iv) <i>Investigations in cases where there is also a complaint against the police subject to investigation under the supervision of the Police Complaints Authority</i>	68 - 70
Informing Applicants of the Progress and Outcome of Cases	71 - 73
Appeals and Judicial Review	74 - 76
The Royal Prerogative of Mercy	77 - 80
Membership and Staff of the Authority	81 - 84
Responsibility for Decision Making	85 - 88
Appointment and Accountability	89
Legal Advice and Assistance	90
Compensation in Cases of Wrongful Conviction	91 - 94
Responses to this Paper	95

This paper discusses possible changes to the powers of the Court of Appeal, Criminal Division, and the establishment of a Criminal Cases Review Authority, in the light of recommendations made by the Royal Commission on Criminal Justice (Cm 2263, chapters 10 and 11). The Government will wish to take account of comments it receives in response to this paper before finalising proposals for legislation.

2. In this paper "the Authority" means the Criminal Cases Review Authority which it is proposed should take over the functions of the Home Secretary in England and Wales in considering representations about criminal cases after normal avenues of appeal have been exhausted; "the Court of Appeal" means the Court of Appeal, Criminal Division in England and Wales; and "the courts" means the appropriate courts in England and Wales to which the Authority would be empowered to refer cases of persons convicted after both trial on indictment and summary trials. The review of cases tried summarily which was not considered by the Royal Commission is the subject of new proposals which are outlined in paragraphs 33 - 38.

GENERAL PRINCIPLES OF REFORM

3. In considering the reform of the Court of Appeal and the establishment of a Criminal Cases Review Authority, the Government has the following policy objectives.

4. The first objective is to ensure that convictions which cannot be considered safe are quashed leaving those which are safe to stand. Second, there must be arrangements to ensure that doubts about the safety of a conviction can be considered and resolved at the earliest opportunity. The courts must therefore have adequate powers to resolve cases at the normal appeal stage so that the need for a further appeal to resolve any remaining or fresh doubts should rarely arise. It would be a mark of failure in the system of criminal justice if a substantial number of cases needed to be reconsidered by the courts on more than one occasion, dragging out the proceedings and causing uncertainty and distress for defendants, for the victims of offences and for the public. A 'last resort' procedure should be precisely that: a vehicle for remedying miscarriages of justice, not an extra stage in the ordinary criminal justice process to be used routinely. The third objective is to ensure consistency of approach in criminal proceedings, so that the final decision on whether or not a conviction should stand is in all cases taken by the courts, whether on an ordinary appeal or following a re-examination of the case by another body.

5. The Government believes that the Royal Commission's recommendations for changes to the Court of Appeal and to the arrangements for considering alleged miscarriages of justice provide a sound basis for change which will ensure that these objectives are achieved.

REFORM OF THE COURT OF APPEAL

6. Decisions about the powers of the Court of Appeal and the criteria by which it operates must be governed by the Government's first objective of ensuring that convictions that cannot be considered to be safe are quashed. The Government believes that this approach reflects the current jurisprudence of the Court of Appeal. The aim of any legislative reform should therefore be to clarify and reflect in statute much of what is already the Court's practice. The new legal framework should then give both the Court and the new Authority, which will necessarily be guided by the Court's powers and practice in determining whether to refer cases to it, a secure and consistent basis on which to consider representations.

(i) Grounds for appeal

7. The Royal Commission was unanimous in its recom-

mendment (rec 316) that the grounds for appeal contained in section 2(1) of the Criminal Appeal Act 1968 should be redrafted. It argued that the grounds were confusing both in their use of the overlapping terms "unsafe" and "unsatisfactory" and in the phrasing of the proviso at the end of section 2(1). For convenience, the text of section 2(1) is set out below:

2(1) Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think:

(a) that the conviction should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or

(b) that the judgement of the court of trial should be set aside on the ground of a wrong decision of any question of law; or

(c) that there was a material irregularity in the course of the trial.

and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred.

8. The Commission did not attempt to redraft section 2(1) but the Government accepts that a re-drafting is a necessary consequence of adopting the approach that the Commission advocates.

9. A majority of the Commission took the view (recommendation 317) that there should be a single broad ground of appeal; that is, that the conviction "is or may be unsafe". This single broad ground would preserve the Court's freedom to consider a wide variety of arguments while ensuring consistency in the way the Court responded to that variety.

10. *The Government is attracted to the broad approach described by the Commission, and for the most part accepts the logic of the detailed recommendations adopted by a majority of the Commission. Equally, it is inclined to support the majority's view that the Court of Appeal should be concerned only with the safety of the conviction, and not as the minority's view seems to imply, with acting as a quasi-disciplinary body, "punishing" errors or incompetence occurring in the original trial process.*

(ii) Error at Trial

11. A majority of the Commission argued (recommendation 318) that:

-where an error at trial appeared to have caused a miscarriage of justice then the appeal should be allowed;

-where it appeared that the error may have caused a miscarriage a retrial should be staged where possible, but where a re-trial was not possible the court should take a decision either to allow or dismiss the appeal;

-where the error appeared not to have caused a miscarriage the appeal should be dismissed.

The Government regards the conclusions of the majority as a sensible consolidation of the Court of Appeal's current practice.

(iii) Reconsideration of the jury's verdict where there is no fresh evidence

12. The Commission argued (recommendation 319) that the redrafted section 2(1) should make it clear that the Court of Appeal has the power to quash a conviction where it appears to the Court that a miscarriage of justice has or may have occurred, despite the fact that the jury reached a verdict having heard all the evidence and without any error having occurred in the trial process. This "lurking doubt" test is not new, but has been used sparingly by the Court of Appeal which is properly reluctant to usurp the role of the jury. The Government accepts that it is right that the Court's freedom to act on a "lurking doubt" should be preserved.

(iv) Fresh Evidence

13. The Commission argued (recommendation 320) that the Court of Appeal should take a broad approach to considering appeals on the basis of fresh evidence. Where evidence had been available at trial but not adduced or where there was a change in the evidence of a witness after the trial, provided that the Court was satisfied that there was a reasonable explanation, it should consider this evidence. The Government is inclined to accept this view as a logical consequence of the Court's primary concern with the safety of any conviction; but considers that the Court should continue to have power to exclude evidence where it considers that there is no reasonable explanation for the failure to deploy it before.

14. The Commission also argued (recommendation 321) that in considering an appeal on the ground of error by legal representatives, the test to be applied should not be whether there was "flagrantly incompetent advocacy" but whether the decision in question led to a miscarriage of justice. The Government sees the force behind this recommendation; but it is also very concerned that the Court should not be seen as merely an alternative forum in which to employ different tactics or a different counsel. It would welcome views on how this difficult balance might best be achieved.

15. The Commission argued (recommendation 322) that, when considering whether to admit fresh evidence, the test should be whether the evidence is "capable of belief" rather than the current test of whether it is "likely to be credible". The Government is inclined to accept this recommendation on the basis that the Court should be free to reach a decision on the safety of a conviction on the basis of all the relevant information available - an initial sift that excludes evidence because it is unlikely to prove credible runs the risk of handicapping the Court unnecessarily, and may prevent a review of the conviction that allows any fresh evidence to be fully considered and weighed in the context of all other relevant evidence already available.

16. The Commission also proposed (recommendation 323) that 'in fresh evidence cases where a retrial was desirable but not practicable' the court should decide the appeal itself. The view of the Crown is an important factor in determining whether a retrial is practicable. The Government agrees with this recommendation.

17. However, a majority of the Commission also argued (recommendation 324) that in cases other than fresh evidence cases, where a retrial is desirable but not practicable, the Court should automatically allow the appeal. The Government is not inclined to accept this recommendation and considers that the minority recommendation - that the Court should decide the appeal itself under these circumstances - fits more logically with the discretion which it is proposed to allow the Court in every other category.

18. In summary, then, the Government is inclined to support the Royal Commission's general prescription for reform of the Court of Appeal, which it believes reflects to a large extent the Court's own developing response to unsafe convictions in recent years. It considers that such an approach is entirely compatible both with the continuing primacy of the jury as the arbiter of fact in all but a small minority of criminal cases, and with the creation of a new independent body to investigate representations made for the most part after all other avenues of appeal have been exhausted. In the Government's opinion, the Court of Appeal will be well equipped to determine appeals and to receive references from the new body if this programme of reform is implemented, but the Government will wish to study the responses to this paper before reaching a final view.

UNCONTESTED APPEALS

19. On occasions a decision is taken by the Crown, in the light of new evidence casting doubt on the safety of a conviction, not to contest an appeal. While this is perhaps more likely to happen in cases referred to the Court of Appeal by the Home Secretary (or by the Authority under the proposed new arrangements), it could also arise in an 'ordinary' appeal, particularly one made out of time and at some distance from the original conviction. Where the Crown does not contest an appeal, the Court of Appeal is nevertheless left with the responsibility of deciding whether the conviction should be quashed and, if so, whether to order a retrial. It has been suggested that in such cases the Court has sometimes been hampered in its role because, in the absence of cross-examination of witnesses by the Crown, it has no means to test the weight of new evidence adduced on behalf of the appellant.

20. It has been suggested that this problem might be overcome if the Court had power to appoint counsel, analogous to an *amicus curiae*, to examine witnesses on its behalf. Important constitutional questions appear to arise out of the Court's dilemma in cases of this kind, and out of the proposed solution. On the one hand, the Court may not feel able in uncontested appeals to perform effectively its role as the ultimate arbiter of the safety of a conviction: it is left with little or no alternative but to uphold the appeal. On the other hand, a decision by the Court to instruct counsel to act in effect on behalf of the Court might be seen as a significant departure from the Court's traditionally neutral role in adversarial proceedings. There would also be implications for those representing the Crown. They might find their own decision as to whether it would be proper to contest the proceedings affected by the knowledge that, if they elected not to do so, the Court might appoint counsel of its own to perform, in part, what would have been the Crown's role.

21. *The Government will wish to give further consideration to the arguments for and against empowering the Court of Appeal to appoint its own counsel in uncontested appeals, in the light of responses to this paper.*

POWER OF THE COURT OF APPEAL TO COMMISSION INVESTIGATIONS

22. Under the Criminal Appeal Act 1907 the Court of Appeal had power to appoint a commissioner to carry out investigations on its behalf, but the power was apparently never used and was repealed in the Criminal Appeal Act 1966. Where the Court requires further information during the course of an appeal, its only recourse at present is to request either or both of the parties to make enquiries or gather further information. The Royal Commission, however, has recommended that the Court should have power to refer matters which require investigation to the new Authority.

23. The proposal to create such a power raises questions both about the circumstances in which it might be used and about the relationship between the Court of Appeal and the new Authority. The need for the Authority to investigate matters at the Court's request would presumably arise only where the Court considered that it would not be sufficient to ask one of the parties to obtain the required information. The latter course might be expected to be preferable in many circumstances, since it would be likely to produce the information more quickly, and the party concerned could bring it directly to the Court without interruption to the normal adversarial process. The need for the Court to request the assistance of the Authority could be expected to arise only in the exceptional case where the Court considered that it could not properly deal with the appeal without some wider-ranging enquiry being made. In such a case the Authority's expertise in commissioning and supervising enquiries and in determining the best way of getting the desired result might be seen as placing it in a good position to assist the Court.

24. If such a power is to be provided, a number of questions will first have to be resolved about the relationship between the Authority, the Court of Appeal, and the parties to the appeal. Should the Court's power be limited to asking the Authority to provide such assistance as it (the Authority) considered would be useful, leaving the Authority with discretion to decline to make enquiries if it considered that they were unlikely to produce useful evidence; or should the Authority be obliged to look into the matter referred but with discretion as to the means and extent of investigation? Would the latter approach be a sufficient reflection of the Authority's independence from the courts? How should the Authority respond to supplementary suggestions from the parties as to matters which should be looked into, other than those suggested by the Court? What action should the Authority take if, in the course of pursuing enquiries suggested by the Court, it were to come across other matters which in its opinion - but not necessarily that of the Court - ought to be pursued for the purposes of the appeal?

25. Questions are also raised about the implications of such a power for the practice of the Court of Appeal. The greater the use of such a power, and the more it was used with a view to establishing matters other than those arising immediately out of evidence which was before the Court, the greater would be the departure from the usual adversarial nature of proceedings in the Court of Appeal. The Court would no doubt have this in mind in deciding how widely, or how sparingly, to use the new power. In particular, there might be implications for the Court's approach to cases in which it felt a "lurking doubt": should it quash the conviction at once, or should it first seek the assistance of the Authority to see whether further investigation might resolve the doubt one way or the other? If the Court were minded to order a retrial, should it do so forthwith, or first establish whether additional evidence could be provided by investigation by the Authority? In both these cases, the objective of quashing unsafe convictions at the earliest opportunity would appear to be better served by *not* launching speculative enquiries through the Authority, delaying the conclusion of the appeal. Finally, the Court of Appeal and the Authority should not be put in the position of having to make up for deficiencies in the preparation of an appeal, or to answer questions which should have been, or which still could be, answered by the parties to the appeal.

26. *The Government's provisional conclusion is that the power suggested by the Royal Commission could be valuable in certain exceptional circumstances, but that difficult constitutional and practical questions are raised which it will be essential to resolve before the scope and*

definition of any new power can be decided. The Government would welcome observations on the potential value of the proposed power and on the questions raised in paragraphs 24-25 above.

CRIMINAL CASES REVIEW AUTHORITY

27. The Government has accepted the Royal Commission's recommendation that representations alleging a miscarriage of justice should in future be examined by a body independent of Government and of the courts. The new body would consider after any necessary investigation whether to refer cases to the courts, which would decide the matter on the basis of a further appeal. This new body, the Criminal Cases Review Authority, would take over the present functions of the Home Secretary.

28. The implications of this change for the functions of the Home Secretary in advising on the exercise of the Royal Prerogative of Mercy are discussed in paragraphs 77 - 80 below.

SCOPE OF THE AUTHORITY'S POWERS

29. The Royal Commission in recommending that the new Authority should take over the Home Secretary's responsibilities for investigating cases and, where appropriate, referring them to the Court of Appeal, was concerned with the current arrangements for considering alleged wrongful convictions in cases tried on indictment. The Home Office currently receives representations in about 625 such cases each year - out of an average annual total of around 725 cases. It seems likely therefore that cases of this sort will form the bulk of the new Authority's workload in the future. However, it is necessary also to consider what arrangements should be made for considering representations about sentence (rather than conviction) and about cases tried summarily (rather than on indictment).

(i) Representations as to sentence

30. Under section 17 of the Criminal Appeal Act 1968 the Secretary of State has power to refer a doubtful sentence as well as a doubtful conviction to the Court of Appeal in any case tried on indictment. There is about one reference a year on grounds relating to sentence, normally either on the basis that the sentence passed by the court and upheld on appeal may have been *ultra vires*, or on the ground that the sentence may have been based on substantially wrong factual information.

31. It does not seem appropriate that this aspect of the section 17 power should remain with the Secretary of State if power to refer convictions is to be transferred to the new Authority, especially as representations not infrequently concern both conviction and sentence in the same case. Nor would it make sense to provide extended rights of appeal direct to the courts in respect of sentence but not conviction. The Authority, on the other hand, would be well placed to carry out enquiries relating to representations about sentence, alongside any enquiries that may be called for in relation to the conviction.

32. Accordingly, it is proposed that the Authority should have power to refer a case to the courts in relation to sentence. The criteria for such references are discussed in paragraphs 47 - 48 below.

(ii) Summary cases

33. The Home Office receives about 100 representations each year in respect of summary convictions. These range from cases which require significant investigation to others (the majority) in which the only question to be answered is whether late evidence supporting the defendant's case (eg a vehicle insurance document) is what it purports to be. There is currently no power to refer summary cases to the courts for a further appeal, and the

only recourse lies in the exercise of the Royal Prerogative of Mercy on the Secretary of State's recommendation.

34. It does not seem appropriate that summary cases should in future have to be dealt with by the exercise of the Prerogative on the recommendation of the Secretary of State, not least in view of the fact that a Free Pardon though it extinguishes all consequences of a conviction does not actually quash it. The Government therefore proposes a new system with two alternative routes of further appeal for summary cases. First, the new Authority should have power to consider and investigate representations in summary cases and to refer cases to the appropriate court. The usual route would be to the Crown Court where appeals against summary convictions are heard.

35. It is, however, desirable that a quicker and more straightforward procedure should be available for dealing with the significant number of cases in which a summary conviction stands entirely on information which is later shown to be erroneous - for example, where in a road traffic case a warning sign turns out to have been incorrectly positioned, or where a defendant is subsequently able to produce evidence such as a valid motor insurance certificate capable of proving that no offence was in fact committed.

36. In this second group of cases, the Government proposes a procedure for quashing the erroneous conviction based on simple verification. An application would be made to the convicting magistrates' court supported by the new evidence, and the Crown would be given an opportunity to indicate whether it wished to contest the application. If it did not wish to do so, the magistrates would be invited to quash the conviction; if the Crown disputed the new evidence there could either be a trial before the magistrates (if the defendant had pleaded guilty originally) or the case could be reviewed in the Crown Court (if there had already been a summary trial).

37. This second route is proposed for those summary cases where there is no need for investigation by the new Authority, so avoiding a potential additional burden and delay in relatively straightforward cases. But clearly there would be a need at an early stage in the further appeal process for a decision to be taken as to which route a particular case should follow - either an investigation and possible retrial at the Crown Court under its appellate jurisdiction (paragraph 34) or the 'simplified' route for cases involving late evidence (paragraphs 35 and 36). The Government's initial view is that the preliminary sift should be carried out by the clerk to the justices in the convicting magistrates' court. The decision as to whether the Authority will investigate a case passed to it by the clerk would be one for the Authority. Views on this proposal and/or suggestions for any alternative initial sifting mechanism are invited.

38. *The Government is minded to introduce in legislation new arrangements along these lines. The details will need careful working out and the Government will wish to consult interested parties.*

(iii) Exclusion of sub judice cases

39. The Government believes that it would not normally be right for the Authority, as a body of last resort, to become involved in cases which are already before the courts or in which an avenue of appeal remains open to the convicted person. Although clearly it would be desirable for the Authority to be precluded in the legislation from dealing with a case which was within the ordinary 28 day limit for lodging an appeal to the Court of Appeal, or one which was already before the Court unless

the Court itself had sought the Authority's assistance (see paragraph 22 - 26 above), an absolute bar on the new Authority beginning an investigation in other circumstances could have an effect contrary to the interests of justice. For example a convicted person who is reluctant to seek leave to appeal - perhaps through fear of another defendant - might take a different view if an investigation revealed evidence which strengthened the case for appeal. The solution might be to preclude the Authority from referring a case to the courts where a direct avenue of appeal remained open, but not to preclude the Authority from investigating a case which was outside the ordinary 28 day limit for lodging an appeal, so that the Authority would not be prevented from looking into the exceptional case in which this might be justified despite no 'first appeal' having been lodged. If, in the course of its investigations, it found material which appeared to touch on the safety of the conviction then the Authority would notify the convicted person concerned, leaving it to them to decide whether or not to lodge an appeal.

40. Subject to further consideration, the Government envisages limitations along these lines on the Authority's power to investigate and refer cases.

GROUNDINGS FOR REFERRING CASES TO THE COURTS

(i) Convictions

41. The policy of successive Home Secretaries has been normally to refer a conviction to the Court of Appeal only if there has emerged some new evidence or other consideration of substance, not previously considered by the courts, which appears to touch the safety of the conviction. These criteria reflect the principle that it would be wrong for a Government Minister to appear to substitute his judgement for that of the courts; they are also, however, consistent with a recognition that in practice the Court of Appeal is unlikely to take a different view of a case which it has previously considered if nothing new has emerged in the meantime.

42. In considering whether to refer a case to the courts, the Authority will be bound to have regard to the courts' statutory powers, policy and practice, and to the likely practical value of further appeal proceedings in cases which will all, or mostly, have already been considered on two occasions by the courts, at trial and on appeal. Given that the courts will remain the ultimate arbiters of the safety of convictions, it would be inappropriate for the Authority to refer cases purely in order to express disagreement with conclusions which the courts had reasonably drawn on previous occasions from evidence and argument fully and properly exposed to them. To do so would suggest that the Authority was seeking itself to act as a kind of higher appellate court, and the courts would be placed in an invidious position in responding to the reference.

43. This suggests that the Authority is likely normally to consider referring cases to the courts where there is some new evidence to be considered, or some other new issue to be raised, which may lead the courts to take a different view of the safety of the conviction. The Government does not propose, however, that the Authority's power to refer should be limited in statute to cases where something "new" appears to have emerged. Apart from the difficulties of interpretation which this would give rise to, it would exclude the possibility of a reference being made in an exceptional case where the Authority felt real disquiet about the safety of a conviction even in the absence of new matters.

44. The Government therefore considers that the Authority should be empowered to refer a conviction to the

courts according to a test expressed in terms wide enough to encompass the variety of circumstances described above, where it appears that there may be grounds for doubting the safety of the conviction and that it would be right for the courts to be given the opportunity to reconsider the case.

45. In addition, the Government considers that it would be helpful, both to the Authority and to potential applicants, for the statute to list the principal factors to which the Authority should be required to have regard in reaching its decision. These factors would guide the exercise of the Authority's discretion without confining it. They might include matters such as the extent to which evidence has come to light which was not previously considered by the courts; and the degree of cogency of any new evidence or consideration when assessed in the light of the case as a whole.

46. It is proposed that the Authority should have power to refer to the courts convictions according to a broad statutory test of the kind described in paragraph 44 above. It is, in addition, suggested that the legislation could also require the Authority to have regard to certain factors, such as those noted in paragraph 45, when coming to a decision on whether or not to refer a case to the courts. It may also be that the Authority should be bound to have regard to certain factors when deciding whether to investigate a case, for example that there is new information or circumstances, the character of which suggests that the conviction is or may be unsafe. Views are sought on all of these matters.

(ii) Sentence

47. Slightly different considerations apply to the grounds for reference of a sentence to the courts. The safety of a conviction is a matter which ultimately, it can be argued, lies objectively in the facts of the case; sentence on the other hand, while it may take account of objective factors, is ultimately a matter for the judgement and discretion of the courts. It is important that nothing should appear to undermine the judgement of the courts in assessing the gravity of criminal conduct in the individual case and the weight to be given to mitigating factors.

48. Accordingly, the Government considers that the grounds on which the Authority might refer a sentence, whether imposed in the Crown Courts or in the Magistrates Courts, back to the courts should be confined to where there is reason to doubt the validity of the sentence in law, or where new information not previously available to the courts suggests that the factual basis on which a sentence was calculated was substantially wrong and no other remedy exists.* The Authority's power would be limited to referring sentences which might, according to the above criteria, be too great. It is not intended that the Authority should play any part in the procedures whereby the Attorney-General may appeal against a sentence which may be unduly lenient.

* Section 47(2) of the Supreme Court Act 1981 enables the Crown Court to vary or rescind a sentence which it has imposed within twenty eight days from the date of imposition, or within a longer period, subject to certain conditions being fulfilled. And section 142 of the Magistrates Courts Act 1980 allows sentences in certain cases and other decisions made in the Magistrates Courts to be corrected. Where a case falls within the scope of either section 47(2) of the 1981 Act or section 142 of the 1980 Act the Government believes that the remedy provided in each case should be used in preference to a reference by the Authority.

PROCEDURE OF THE COURT OF APPEAL IN AN APPEAL FOLLOWING A REFERENCE

49. As a general principle, it seems desirable that appeals following a reference by the Authority should be treated in the same way as ordinary appeals, so as to avoid arbitrary inconsistencies in the treatment of appellants and the risk of perceived unfairness. If the Court has sufficient and flexible powers, as discussed in paragraphs 6 to 26 above, it should have no difficulty in dealing with the full range of cases which come before it. Some 'reference' cases are inherently difficult because of the length of time which has elapsed since the material events; because of the difficulty of re-evaluating the process which led to conviction when law, procedures and standards of investigation, prosecution and trial have developed in the intervening years; and because of the complex interaction of old and new evidence which often obtains. Other 'reference' cases, however, are no more or less straightforward than 'ordinary' appeals and it would be very difficult and probably unfruitful to attempt to distinguish a particular category of appeal and provide special rules for that category.

50. The Government shares the view of the Royal Commission that the part played by the Authority should cease once a reference is made. The Authority should provide the court with an indication of the main points which had led it to refer the case; but this would be simply a guide to help focus the court on the issues likely to feature in the appeal; it would not prevent the parties from seeking to adduce any relevant evidence whether or not it had been considered during the Authority's examination of the case. This is consistent with present practice in 'reference' cases, as established in *Chard*.

PROCEDURE FOR CONSIDERATION BY THE AUTHORITY

(i) General

51. The Authority will have a substantial number of cases coming to it for consideration. It will therefore need to adopt a flexible approach to its tasks, distinguishing those cases which require fuller and deeper investigation, and then in due course distinguishing those which merit a reference to the courts. Home Office experience suggests that attempts to categorise cases for the purpose of constructing rigid procedures would only lead to inefficiency, delay, and inappropriate handling. It will therefore be important for the Authority to have sufficient scope to decide, on its initial view of a case, which aspects of a case may need further enquiry and by what means.

52. The Government envisages that the Authority, as a non-adversarial body conducting neutral enquiries into cases put to it, would proceed by means of investigation rather than by conducting hearings with the parties represented as would be the case if it were a tribunal. Such hearings would be more likely to prolong the review of a case with repetition of arguments conducted at trial or on appeal than to advance the Authority's understanding of the evidence. More fundamentally, an adversarial procedure of this kind would uncomfortably blur the distinction between the Authority's role and that of the courts. There would be a danger that the Authority would in effect begin itself to hear an appeal, instead of adhering to its role of deciding whether to refer the case to the courts.

53. The absence of hearings on adversarial lines would not preclude the Authority itself from hearing from a petitioner or any other witness if it thought it necessary. It could either do this itself or invite any police force that might be making enquiries on its behalf to do so.

(ii) Investigations

54. The Authority will need flexible powers to carry out or commission a wide range of enquiries, from requests for information or advice on specific points to full-scale investigations looking at all aspects of the case. It should be open to the Authority to seek, for example, a report from a forensic scientist or a psychiatrist; and to seek information or documents from Government Departments and other public authorities.

55. The Royal Commission concluded that in view of the size and scope of the enquiries needed in some of these cases, and the resources involved, there was no practical alternative to investigations being carried out by the police. The Commission recommended that the Authority should have powers analogous to those of the Police Complaints Authority in major cases to oversee investigations, including the power to require, where appropriate, the appointment of investigating officers from a force other than that which carried out the original investigation.

56. The Government shares the view that it will be essential for the Authority to be able to make use of the skills and expertise of the police in criminal investigations, if enquiries into possible miscarriages of justice are to be effective. But it has still to reach a final view about what kind of structure would achieve this objective most effectively and efficiently - from the point of view not only of the Authority but also of individual police forces which have to manage a variety of competing demands on their resources.

57. An alternative to the Police Complaints Authority model suggested by the Royal Commission might be for a number of experienced police officers to be seconded to the Authority - to carry out investigations on its behalf and to provide more general advice on police practice and on the scope for investigation in particular cases. There might be some merit in establishing a concentrated pool of expertise in this way; and individual police forces would be saved from having to divert detective officers, perhaps at short notice, to enquiries whose length and demand on manpower can be hard to predict.

58. There would, however, almost certainly be disadvantages to this sort of arrangement. Experience has shown that in a significant number of cases where the issue needing to be resolved is fairly straightforward, it is far quicker and more economical if enquiries are made by the original investigating force which knows the background to the case, where to locate relevant documents and so on. It could well be uneconomic and wasteful to have a new group of officers unfamiliar with the case making such enquiries.

59. The demand for the larger and more complex type of investigation is likely to fluctuate considerably, so that it would be difficult to establish a unit of the optimum size. The risk would be that at some times the unit would be under-occupied, while at other times the investigation of representations would be substantially delayed. In the case of the former, the trained and experienced investigating officers employed in such a unit would be unavailable to individual police forces where they could have been deployed more flexibly, undertaking other duties when not required for investigating possible miscarriages of justice.

60. The concept of having a central unit also raises other difficult issues. A unit large enough to function effectively would make an appreciable difference to the size of the Authority and would require enhancement of its management and support structures, adding to its overall

costs. The officers in the unit would have to be accountable for the exercise of police powers and subject to appropriate disciplinary arrangements in respect of their operational duties; and special arrangements would have to be made to enable the officers in the unit to benefit from training opportunities and to keep in touch with developments in police practice and investigative techniques.

61. A second alternative to the model suggested by the Royal Commission might be to have a **core** central unit of officers seconded to the Authority; but to give the Authority in addition powers to commission investigations on the Police Complaints Authority model. This would mitigate the problems of potential inflexibility, enabling a core unit to carry out or assist in some major investigations; while enquiries of a lesser scale could be carried out, under the Authority's supervision, by officers of the original force, or of another force, where that appeared to represent the more effective and economical approach all things considered.

62. On the other hand, there is a danger that this approach might turn out to represent the worst rather than the best of both worlds, with the additional administrative and logistical burden on the Authority not being matched by the gain to individual police forces being saved from having to divert detective officers at short notice to work on the Authority's behalf. And in practice it could be difficult to define and maintain any clear distinction of principle between the sort of investigations appropriate to the Authority's own team of officers and those appropriate to police forces acting on the Authority's behalf, with applicants left unclear as to why their case had been handled in one way rather than another.

63. Whichever of these options appears, in the light of further examination, to be the most suitable, it will be desirable, particularly in the beginning, for a minimum of one or more experienced police officers to be part of the staff of the Authority so as to provide the Authority with advice about police practice and investigations, and to provide a link between the Authority and police forces.

64. *It is proposed that the Authority should have powers to request and, where appropriate, oversee enquiries carried out by police officers experienced in investigations. The Government intends to give further consideration, in consultation with interested parties and having particular regard to the competing demands on police service resources, to the arrangements needed to give effect to this.*

65. At present, the Home Secretary very occasionally receives representations in cases where the original investigating authority was a body other than the police. Special arrangements may be needed to enable the Authority to re-examine cases of this kind, and the Government intends to give this further consideration.

(iii) Other powers to facilitate the Authority's enquiries

66. The Government considers that it is desirable so far as possible to avoid the proliferation of powers involving compulsory process: given that the Authority will be empowered to commission enquiries by police officers, that should provide sufficient powers to obtain evidence without the need to give the Authority separate powers of its own. However, it may be necessary to establish in legislation the Authority's right of access to certain documents and information which will be essential to its basic operation, in particular such things as case papers held by counsel and transcripts of evidence adduced at trial. To the extent that such a power might require any changes to current procedures for retaining and storing

records on the part of the various bodies involved, it would be necessary to consider carefully the practical and cost implications for the organisations concerned.

67. The Government intends to give further consideration therefore to the need for statutory provision for this purpose, and will wish to take into account observations by those responding to this paper on what should be the nature and extent of such provision.

(iv) Investigations in cases where there is also a complaint against the police subject to investigation under the supervision of the Police Complaints Authority

68. A significant minority of cases in which a miscarriage of justice is alleged also involve a complaint against the police subject to investigation under the supervision of the Police Complaints Authority (PCA) in accordance with Part IX of the Police and Criminal Evidence Act 1984. At present, the practice in such cases is for enquiries into the miscarriage of justice and complaints aspects to be undertaken in a single investigation supervised by the PCA, with the investigating officers' report going both to the PCA and to the Secretary of State. The question is raised as to how such cases should be handled under the new arrangements, in which two independent authorities, the Criminal Cases Review Authority and the PCA, will have parallel statutory powers to oversee an investigation. In most cases, it is likely to be both most effective and most efficient for a single police investigation to pursue both sets of enquiries; but there would clearly be practical problems, not least for the investigating officers, in enquiries being overseen simultaneously by two bodies with different and at times potentially conflicting functions and priorities.

69. One solution would be to seek to establish at the outset what enquiries will be necessary to fulfil the separate purposes of miscarriage of justice and complaints investigations. One body might then oversee all the enquiries and ensure that an appropriate report was made to the other at the end of the day. Legislation would be needed to establish the mechanism for allocating responsibilities.

70. The Government will wish to give further thought to this question in the light of consultation.

INFORMING APPLICANTS OF THE PROGRESS AND OUTCOME OF CASES

71. The Government agrees with the Royal Commission that those seeking a review of their case by the Authority should be kept properly informed of progress and should be given so far as possible a full and reasoned explanation of any decision not to refer the case to the courts. It is important that the Authority should be responsible for taking its own decisions about the extent of information to be provided at any particular stage, and that the interests of necessary confidentiality and effective investigation should be preserved. The Authority will be conducting investigations, not legal proceedings, and questions of disclosure will fall to be considered accordingly. The reports of police enquiries - as distinct from witness material and evidence obtained in the course thereof - will, in common with other advice obtained by the Authority from its staff or other sources, be required to be treated in confidence, as is the case with reports of criminal investigations and with internal discussion in all other contexts.

72. It should also be for the Authority to decide whether and to what extent to seek the observations of the applicant on matters which may have arisen from an

investigation, before any decision is taken on how to deal with the case. In some cases the issues will be clear-cut and consultation with the applicant would serve no useful purpose but would only delay the case, diverting resources from other important work. In other cases, the Authority may wish to clarify with the applicant issues which have been raised in an investigation.

73. Accordingly, it is proposed that the Authority itself should determine in the circumstances of each case what information it is appropriate to provide to applicants about the progress of enquiries and about the decision taken at their conclusion, with a view to being open and fair while preserving necessary confidentiality. In the event of a case being referred to the courts, an appeal would be set in train and would be subject to the appropriate rules of disclosure including those relating to public interest immunity. Disclosure generally is currently subject to review in the light of the recommendations of the Royal Commission. The obligation of disclosure to the defence would fall not on the Authority but on the Crown.

APPEALS AND JUDICIAL REVIEW

74. The Government agrees with the Royal Commission that the decisions of the Authority should not be subject to appeal on the substance to a court or to any other supervisory body. This is important so that the Authority can be assured of its independent status. The absence of a formal right of appeal would not prevent a person, as at present, from making fresh representations at some later date in the light of new developments in the case.

75. The Royal Commission also recommended that judicial review should not lie against decisions of the Authority. The Government sees the force of this recommendation. On the other hand, it might be argued that, given the importance of the Authority's decisions and their effect on personal liberty, it would be wrong to dispense with the safeguard of judicial review proceedings, going not to the substance of the Authority's decisions but to their lawfulness or reasonableness or the manner in which they were taken.

76. The Government proposes to accept the Royal Commission's recommendation that there should be no avenue of appeal on the substance of the Authority's decisions; and would welcome views on the Commission's further recommendation that the possibility of judicial review should be excluded.

THE ROYAL PREROGATIVE OF MERCY

77. The creation of an independent body to review alleged miscarriages of justice raises the question of the future role of the Royal Prerogative of Mercy. In modern times the Royal Prerogative of Mercy has been used as a final safeguard in exceptional cases where injustice cannot be corrected by the normal processes of law, and to exercise clemency in circumstances which could not have been considered by the courts or which it would be inappropriate now to remit to the courts to consider. Thus the Prerogative is exercised in circumstances where there is doubt about the safety of a conviction but the case cannot be referred to the courts. It is used in summary cases where there is no power to refer; and in a quite different range of circumstances where there are exceptional reasons to mitigate a penalty - for example, on compassionate grounds to allow the early release of a prisoner who is terminally ill.

78. The exercise of the Royal Prerogative of Mercy in summary cases would be rendered unnecessary if, as proposed in paragraph 38 above, new provision is made to enable such cases to be reconsidered by the courts. In cases tried on indictment, it is already exceedingly rare for

the Prerogative to be exercised on account of doubts about the safety of a conviction, and in such cases references will be made to the Court of Appeal wherever possible.

79. The intention in establishing the proposed new arrangements is that cases of alleged wrongful conviction should be considered by a body independent of Government and that Ministers should no longer be involved in deciding individual cases. It is clearly important that the independence and authority of the new body should not be undermined by any expectation that the Home Secretary, through the exercise of his functions in relation to the Prerogative, will act as a kind of court of appeal in cases which have been considered and dismissed by the Criminal Cases Review Authority or by the courts.

80. The Government is therefore considering whether it would be desirable and practicable to establish in legislation that the Royal Prerogative of Mercy shall not be exercised for the purpose of acknowledging doubts about a conviction in a case which the Authority has considered or which it would be within its remit to consider, subject to any exceptions that might be necessary for the circumstances of an unusual case. The Royal Prerogative of Mercy would continue to be exercisable in other circumstances, for example to remit part of sentence on compassionate grounds.

MEMBERSHIP AND STAFF OF THE AUTHORITY

81. The Government shares the view of the Royal Commission that the members of the Authority should be a mixture of lay people and people with legal qualifications. The most important qualifications for the work which the Authority will undertake are likely to be an ability to assess and interpret facts and behaviour; patience and sensitivity; and an open-minded determination to get to the root of what are often complex and enigmatic problems. As several commentators have noted, a fresh perspective is likely to be especially valuable in reviewing cases which the ordinary processes of law have failed to resolve satisfactorily. This might be provided by appointing to the Authority non-legal members with experience of the criminal justice system, as well as others who could bring a range of appropriate skills and experience from other backgrounds.

82. A legal contribution to the Authority's work will, however, also be valuable. In addition to the employment of lawyers among the Authority's staff, it would be helpful to have some senior and experienced lawyers among the members, and these might usefully include a lawyer with experience of conducting inquiries. The Government is inclined to share the Royal Commission's view that the Chairman of the Authority should not necessarily be a judge; in particular, a non-judicial appointment could help to underline the Authority's independence from the courts. However, the qualities of the individual concerned will be the most important consideration; and the Government is not presently persuaded that the legislation should absolutely preclude the appointment of serving or retired judges. This might have the unfortunate effect of deterring the most suitable candidate for a post on the Authority whether at the outset or in the future.

83. The Authority will require a substantial administrative support. Its staff will require similar general qualities to those of its members as well as administrative skills and experience including the ability to manage demanding caseloads, powers of analysis and communication, and the ability to recognise and apply priorities. Some staff should have legal qualifications, and others might have experience of police work or of other kinds of investigation.

84. *The Government is still considering the size and composition of the Authority and its staff, and will wish to take account of observations made in response to this paper.*

RESPONSIBILITY FOR DECISION MAKING

85. The Authority will need to have a clear management structure and lines of responsibility for decision making. Given the range of cases which will come before it, it is desirable that the Authority should have the flexibility to manage its resources efficiently, while ensuring that decisions are taken at a level which reflects their importance and which will command confidence. Those cases which raise an issue requiring investigation should receive the attention of a member of the Authority, who should take the lead at the appropriate stage in deciding whether a reference to the courts is justified.

86. An important question is whether a decision to refer a case to the courts should be made by the member of the Authority responsible for the case acting alone, or whether such a decision should be made by a quorum of the Authority, or by a smaller panel of members, or by a single member with the consent of the Chairman.

87. The advantage of such decisions being taken by a member alone is that delays would be reduced and the overall workload on the members minimised. The member responsible for the case will have the greater knowledge of it; and, arguably, the involvement of other members as a matter of course might add little of value. A member entitled to take decisions on behalf of the Authority would not, of course, be precluded from taking a second opinion, from the Chairman or from any other member, about the case as a whole or about a particular point of difficulty. On the other hand, it will be vitally important that the Authority should not be thought to be acting capriciously. By deliberate choice, its individual members may be different sorts of people, with different backgrounds, expertise and attitudes. It may be thought that an assessment which in effect gives to one person the powers now exercised by the Secretary of State to reject or agree to an application for referral is an insufficient improvement on the present position. The advantages of requiring the involvement of one or more other members of the Authority are that a second opinion from someone coming to the case from a fresh perspective would always be provided; and that a greater degree of consistency in the Authority's decision making might be expected. But the circumstances of individual cases vary very widely and whatever arrangements are decided upon for decision-making, it may be possible to aim for consistency only in fairly broad terms.

88. *The Government will give further consideration to the question of how the Authority should decide whether or not to refer a case to the Court of Appeal in the light of views expressed in response to this paper.*

APPOINTMENT AND ACCOUNTABILITY

89. In view of the status of the Authority and the nature of its task, the Government proposes that its members should be appointed by Her Majesty the Queen on the advice of the Prime Minister. Accountability for the body within Government should fall to the Home Secretary, who would receive and lay before Parliament an annual report made by the Authority, as recommended by the Royal Commission. Ministers would, however, have no part in the decisions taken by the Authority nor in its approach to cases, which will be a matter entirely for the Authority to determine in accordance with the statute and with the law as developed by the courts.

LEGAL ADVICE AND ASSISTANCE

90. Convicted persons making representations to the Authority will continue to have the opportunity to obtain assistance from the legal aid fund, subject to the usual requirements, under the 'Green Form' scheme. This enables applicants to obtain advice from a solicitor and help in preparing representations. Once representations have been received by the Authority, it will be for the Authority to undertake such further investigation as it considers necessary in deciding whether a reference to the courts is justified. The Authority's proceedings will be investigative and non-adversarial, so that the need for legal representation will not arise at that stage. Where a case is referred to the courts, the normal entitlements to legal aid on appeal will become available.

COMPENSATION IN CASES OF WRONGFUL CONVICTION

91. The Royal Commission was not asked to examine the arrangements for compensation in cases of wrongful conviction; but the Government has considered whether any change to the procedures should be made in the light of the creation of the new Authority.

92. There is a statutory entitlement to compensation in cases which fall within section 133 of the Criminal Justice Act 1988, which in turn reflects the Government's obligations under international law. In addition, the Home Secretary is prepared to make *ex gratia* payments in certain circumstances falling outside the terms of section 133 of the 1988 Act, and for this purpose is guided by the policy set out in a statement made to Parliament on 29 November 1985. The amount of compensation awarded is determined in every case by an independent assessor, currently Sir David Calcutt QC.

93. The Government has concluded that decisions on the awards of compensation are not a responsibility which it would be suitable to place on the new Authority. The decision to be taken is of a different nature to those with which the Authority will be established to deal; and in a substantial number of cases where compensation is sought the convictions have been quashed on an appeal made out of time rather than on an appeal following a reference, so these are not the sort of cases which the Authority would have considered at an earlier stage. It would be particularly difficult to define in legislation the sort of exceptional circumstances for which the *ex gratia* arrangements are intended.

94. *The Government has concluded accordingly that there should be no change to the present arrangements for deciding whether compensation should be awarded and for determining the amount of such awards.*

RESPONSES TO THIS PAPER

95. *Responses to this paper should be sent to Miss C F Byrne, the Home Office, C3 Division, room 218, 50 Queen Anne's Gate, London, SW1H 9AT. Additional copies can be obtained from the same address, or by telephoning Miss A Byrne on 071 273 3752. Responses should reach the Home Office no later than 31 May 1994.*